QUESTIONS PRESENTED

1. Is reasonable suspicion or probable cause the level of justification that needs to be satisfied to render an unannounced home entry to execute a search warrant reasonable under the Fourth Amendment?

2. Does the ease with which drugs can be destroyed or the likelihood that drug dealers are armed satisfy the requisite level of justification (reasonable suspicion or probable cause) to authorize the police to make an unannounced entry to execute a search warrant for evidence of drug dealing, as that phrase is defined by the Wisconsin Supreme Court in State v. Richards, 549 N.W.2d 218, 219 n.2 (Wis. 1996), and State v. Stevens, 511 N.W.2d 591, 595 (Wis. 1994), cert. denied, 115 S. Ct. 2245 (1995)?

3. If the holding in Stevens does not establish that the police entry was reasonable in this case, was the entry reasonable because any further announcement by the police would have been a "useless gesture"?

4. If the entry to execute a search warrant was in violation of the Fourth Amendment, does the exclusionary rule require the suppression of evidence seized in the execution of the warrant?

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No. 96-5955

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

STEINEY RICHARDS,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The respondent agrees with the petitioner's Statement of the Case with the possible exception of two ambiguous statements. In addition, a more complete statement of the facts is necessary to understand why the petitioner would not obtain suppression of the evidence even if this Court found that the blanket rule approved by the Wisconsin Supreme Court is invalid.

At page 2 of the Petition for a Writ of Certiorari, the petitioner states: "The police did not comply with the announcement rule in effecting the entry." The respondent agrees that the police did not announce their purpose prior to entry. However, the respondent believes, and the Wisconsin Supreme Court found, that

the entry was in compliance with the approved exceptions to the rule of announcement.

At page 3 of the Petition for a Writ of Certiorari, the petitioner states: "The Wisconsin Supreme Court held that the particular circumstances of this case did not matter in light of the blanket exception to the announcement rule." That statement is not accurate. The circumstances in this case that provided the police and the magistrate with probable cause to believe that the defendant possessed controlled substances with intent to deliver also provided the police with the information necessary to show that announcement of identity and purpose prior to entry would present a threat of physical violence and create a likelihood that evidence would be destroyed. Therefore, the circumstances of this case were important because they were consistent with the experience of police in similar circumstances where there was a threat of violence and the destruction of evidence.

Additional facts must be considered because they would be relevant if this Court concluded that the blanket rule approved by the Wisconsin Supreme Court was invalid. The additional facts were set forth in the concurring opinion in State v. Richards, 549 N.W.2d 218, 228 (Wis. 1996):

> Prior to executing the search warrant against the defendant in this case, the police knew that the defendant had previously been arrested for the possession of 63 packets of cocaine. Furthermore, after the defendant had checked out of another hotel, the police had found clear plastic sandwich bags like the ones used in packaging cocaine. Finally, information obtained from an informant demonstrated that the defendant and his companions had engaged in conduct that matched a drug courier profile, including paying in cash, refusing room service, and making and receiving numerous phone calls from their room.

> While the circuit court found that these facts were sufficient to establish probable cause for a search warrant, it found them insufficient to justify a no-knock warrant and therefore rejected the request for a no-knock warrant.
>
> When the police proceeded to execute the warrant, additional circumstances came into play. When the police first sought entry through a ruse, with one officer posing as a maintenance man, the defendant opened the door and then rapidly shut it again. The state and the defendant dispute whether the defendant recognized that the "maintenance man" was a police officer, as well as whether he saw the fully uniformed police officer standing to the right of the "maintenance man." The circuit court characterized the defendant's testimony as self-serving and apparently accepted the officers' statement of what had happened.

After the defendant closed the door, the police heard the deadbolt being locked (42:16-17, 19). The police then forced open the door to gain entry to the motel room (42:17).

ARGUMENT

REASONS FOR DENYING THE WRIT

I. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR RESOLVING CONFLICTS AMONG COURTS BECAUSE RESOLUTION OF THE CONFLICT IS IRRELEVANT TO THE ULTIMATE OUTCOME OF THIS CASE.

The petitioner asks this Court to review the decision of the Wisconsin Supreme Court in State v. Richards, wherein the court reaffirmed the holding in State v. Stevens, 511 N.W.2d 591 (Wis. 1994), cert. denied, 115 S. Ct. 2245 (1995), and concluded

> that exigent circumstances are always present in the execution of search warrants involving felonious drug delivery: an extremely high risk of serious if not deadly injury to the police as well as the potential for the disposal of drugs by the occupants prior to entry by the police. The public interests inherent in these circumstances far outweigh the minimal privacy interests of the occupants of the dwelling for which a search warrant has already been issued. Accordingly, we re-affirm State v. Stevens, 181 Wis.2d 410, 511 N.W.2d

591 (1994), cert. denied, ___ U.S. ___, 115 S.Ct. 2245, 132 L.Ed.2d 254 (1995), and conclude that police are not required to adhere to the rule of announcement when executing a search warrant involving felonious drug delivery.

Richards, 549 N.W.2d at 219 (footnotes omitted).

The court explained that it used "the phrase 'felonious drug delivery' to mean delivery of drugs or felonious possession with intent to deliver drugs."[1] Richards, 549 N.W.2d at 219 n.2.

The petitioner states that the blanket rule stated in Richards is inconsistent with the holdings in other jurisdictions; and he asks this Court to grant certiorari to establish a uniform rule. Petition for a Writ of Certiorari at 13-14.

The petition is internally inconsistent. At page 6, the petition expresses a concern for the floodgates opening with courts following the holding in Richards, but at pages 13 to 14 the petition states that "Wisconsin . . . is alone amidst state courts of final resort to adopt a blanket rule after Wilson [v. Arkansas, 115 S. Ct. 1914 (1995)]." If Wisconsin is alone, apparently the petitioner's concern about the floodgates opening is unfounded.

To the extent there is a conflict among jurisdictions concerning the application of the rule of announcement in light of

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[1]The petitioner several times misstates the holding of the decision in Richards when he states that the decision permits unannounced entries in "drug cases." Petition for a Writ of Certiorari at 4 and 21. Also, in stating the "Questions Presented" in the petition, the petitioner incorrectly implies that the Wisconsin Supreme Court approved unannounced entries "if the police have a warrant to search for drugs" or "if drugs are the object of a search warrant." These questions obviously misstate the holding of the Wisconsin Supreme Court in Richards, 549 N.W.2d at 219 n.2, where the court carefully defined its terms to limit the holding to warrants for felonious delivery of drugs or felonious possession with intent to deliver drugs. Therefore, the holding in Richards does not apply to all "drug cases," as the petition implies.

the holding in Wilson v. Arkansas, 115 S. Ct. 1914 (1995), this case is not the appropriate vehicle for resolving the conflict because resolution of the conflict is irrelevant to the outcome of this case. Even if the law is defined in the way suggested by the petitioner, the police entry in this case was legal. The concurring justice in Richards agreed with the petitioner's interpretation of Wilson and the application of the rule of announcement; but the concurring justice concluded that the police entry was legal.

After describing the facts as reported at pages 2 to 3 of this response, Justice Abrahamson concluded:

> Under these circumstances, compliance with the knock-and-announce-rule would constitute a "useless gesture." It has long been recognized "that notice is not required when it is evident from the circumstances that the authority and purpose of the police is already known to those within the premises." 2 Wayne R. LaFave, Search and Seizure § 4.8(f), at 620 (3d ed. 1996) (collecting cases); see also State v. Berry, 174 Wis.2d 28, 32, 496 N.W.2d 746 (Ct.App.1993) (when law enforcement officers hold a "reasonable belief that compliance with the rule" of announcement "would be a useless gesture," they need not comply with it).

Richards, 549 N.W.2d at 228 n.3.

In this case, further announcement by the police would have been useless because, after seeing a police officer outside his door, the defendant slammed the door in the face of the police. Richards, 549 N.W.2d at 228 n.3. The actions of the defendant indicated that he knew why the police were present. In addition, the actions of the defendant in closing and locking the door provided reason for the police to believe that evidence would be destroyed or that the defendant would flee, thereby giving the

police justification to enter without further announcement. Wilson, 115 S. Ct. at 1919.

In other words, even if the conflicts in the law were resolved in the way suggested by the petitioner, the law would recognize that the police had particular information that provided a reason to believe that evidence would be destroyed or the defendant would flee if the police made a further announcement of identity and purpose before entering. Because the police had reason to believe that evidence would be destroyed or that the defendant would flee, the police were authorized to make the entry to execute the search warrant.

Therefore, even if the conflicts in the law were resolved in the manner suggested by the petitioner, the resolution of the conflicts would be irrelevant to the outcome of this case because the police would still be found to have legally entered the room and the evidence would be admissible.

Because resolution of the conflicts would be irrelevant to the outcome of this case, the Petition for a Writ of Certiorari should be denied. Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller, Supreme Court Practice, at 173 (7th ed. 1993).

II. THE HOLDINGS OF STEVENS AND RICHARDS DO NOT CONFLICT WITH THE DECISION OF THIS COURT IN WILSON.

The petition alleges that the holding in Richards conflicts with the holding in Wilson. Petition for a Writ of Certiorari at 4.

In Wilson, 115 S. Ct. at 1918, this Court held:

> Our own cases have acknowledged that the common-law principle of announcement is "embedded in Anglo-American law," Miller v. United States, 357 U.S. 301, 313, 78 S.Ct. 1190, 1198, 2 L.Ed.2d 1332 (1958), but we have never squarely held that this principle is an element of the reasonableness inquiry under the Fourth Amendment. We now so hold. Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment.

(Footnote omitted.)

The Court recognized that in some circumstances unannounced entries would be reasonable; but the Court did not define those circumstances. Instead, the Court left it to lower federal courts and state courts to do so. Wilson, 115 S. Ct. at 1918-19. This Court explained in Wilson, 115 S. Ct. at 1919:

> We need not attempt a comprehensive catalog of the relevant countervailing factors here. For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment. We simply hold that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry.

In Richards and Stevens, the Wisconsin Supreme Court simply defined one of those circumstances where an unannounced entry to execute a search warrant is reasonable under the Fourth Amendment.

In Stevens, 511 N.W.2d at 595, the court adopted a blanket rule that, when the police have a search warrant, supported by probable cause, to search a residence for evidence of delivery of drugs or evidence of possession with intent to deliver drugs, they

have reasonable cause to believe exigent circumstances exist; and, thus, in all such searches the police are justified in dispensing with the rule of announcement and making a no-knock entry.

In Richards, the Wisconsin Supreme Court reaffirmed the holding in Stevens and concluded

> that exigent circumstances are always present in the execution of search warrants involving felonious drug delivery: an extremely high risk of serious if not deadly injury to the police as well as the potential for the disposal of drugs by the occupants prior to entry by the police. The public interests inherent in these circumstances far outweigh the minimal privacy interests of the occupants of the dwelling for which a search warrant has already been issued. Accordingly, we re-affirm State v. Stevens, 181 Wis.2d 410, 511 N.W.2d 591 (1994), ___ U.S. ___, cert. denied, 115 S.Ct. 2245, 132 L.Ed.2d 254 (1995), and conclude that police are not required to adhere to the rule of announcement when executing a search warrant involving felonious drug delivery.

Richards, 549 N.W.2d at 219 (footnotes omitted).

The petition contends that the blanket rule approved in Stevens and reaffirmed in Richards is not permitted by Wilson. Petition for a Writ of Certiorari at 6-7.[2]

Blanket rules are not prohibited by the Fourth Amendment. This Court has recognized the validity and need for blanket rules in law enforcement. In Michigan v. Summers, 452 U.S. 692, 705 n.19 (1981), this Court acknowledged the validity of blanket rules when

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[2]The petition states that this Court in Wilson chose not to endorse a blanket rule. Petition for a Writ of Certiorari at 10. There is nothing in the Wilson opinion, however, addressing the question of blanket rules. Since the only question addressed in Wilson, 115 S. Ct. at 1916, was whether the common-law knock-and-announce principle formed a part of the Fourth Amendment reasonableness inquiry, it is not surprising that the opinion did not address the question of blanket rules.

it recognized the importance of deciding cases on categorical rather than ad hoc bases:

> As Justice WHITE noted in his concurrence in Dunaway, if police are to have workable rules, the balancing of the competing interests inherent in the Terry principle "must in large part be done on a categorical basis--not in an ad hoc, case-by-case fashion by individual police officers." 442 U.S., at 219-220, 99 S.Ct., at 2260.

In addition, in Colorado v. Bertine, 479 U.S. 367, 375 (1987), this Court recognized the need and usefulness of easy to apply standards:

> We reaffirm these principles here: "'[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'"

The blanket rules are proper where they are supported by the applicable level of justification. In Stevens, the Wisconsin Supreme Court concluded that its rule was so supported. The Wisconsin Supreme Court in Stevens, 511 N.W.2d at 595, concluded that where police have a warrant to search for evidence of drug dealing, "they necessarily have reasonable cause to believe exigent circumstances exist." See also Richards, 549 N.W.2d at 221, describing the holding in Stevens. In Richards, the court concluded that the rule was supported by the circumstances particular to drug dealing because experience established that drugs dealers probably will have weapons and probably will attempt to destroy evidence if the police announce their identity and purpose prior to entering. Richards, 549 N.W.2d at 222-25. Thus, the Wisconsin Supreme Court relied on the particular circumstances applicable to the evidence of drug dealing in Stevens and Richards.

The Wisconsin Supreme Court in those cases did not rely on some general circumstances unrelated to the facts of those cases as the petition accuses the court of doing. Petition for a Writ of Certiorari at 12-13.

Because the court in Richards relied on the facts applicable to drug dealers, including the dealer described in the search warrant, the issue is whether the facts of the case support the court's denial of the suppression motion. Such a sufficiency of the evidence issue does not merit review by this Court.[3]

III. CONCERNS FOR SAFETY SHOULD NOT BE A REASON FOR THIS COURT TO GRANT THE PETITION FOR A WRIT OF CERTIORARI.

The petitioner asks this Court to grant certiorari "to avoid needless citizen and officer deaths. Innocent people will die as a result of the lower court decision." Petition for a Writ of Certiorari at 21.

The petitioner's claim is contradicted by the opinions in Stevens and Richards. Both decisions recognize that the officers executing the search warrant have the "'incentive to choose the safest method of entry.'" Richards, 549 N.W.2d at 225, quoting Stevens, 511 N.W.2d at 597.

As discussed by the court in Richards, 549 N.W.2d at 222-28, the execution of search warrants is dangerous. The unannounced entry is frequently the safest because it enables the police "to

---

[3]This case, which simply reaffirms the holding of State v. Stevens, does not merit review by this Court any more than did the decision in Stevens, a case in which this Court denied certiorari on May 30, 1995, just eight days after the Wilson case was decided. Stevens v. Wisconsin, 115 S. Ct. 2245 (1995).

establish command of the scene quickly and to secure the safety of themselves, the occupants and the place to be searched." Richards, 549 N.W.2d at 223. See also Stevens, 511 N.W.2d at 596-97.

The people best able to determine the safest method of entry in a particular case are the police who must make the entry. It cannot be said that granting the writ of certiorari in this case to reverse the decision of the Wisconsin Supreme Court will avoid citizen and officer deaths. If officers are prevented from making the safest entry, deaths may increase. The safest route for the courts is to do as the Wisconsin Supreme Court did in Stevens, 511 N.W.2d at 597, and "yield to the police officers' discretion in choosing whether or not to follow the rule of announcement" because the police have "the incentive to choose the safest method of entry."

IV. ADDITIONAL ISSUES SHOULD BE CONSIDERED IF THE COURT GRANTS THE PETITION FOR A WRIT OF CERTIORARI.

The petitioner requests this Court to grant the writ of certiorari to consider whether the decision in Richards conflicts with this Court's decision in Wilson.

If the Petition for a Writ of Certiorari is granted, the State of Wisconsin will ask the Court to consider the following additional issues: whether the level of justification the police must satisfy to make an unannounced entry is a reasonable suspicion or a probable cause test; whether the entry in this case was reasonable because further announcement after the defendant slammed and locked the door in the face of the police would have been a "useless gesture"; and whether the exclusionary rule requires the

suppression of evidence for a violation of the rule of announcement when the police are executing a valid search warrant. The State of Wisconsin will contend that under Murray v. United States, 487 U.S. 533 (1988), and Segura v. United States, 468 U.S. 796 (1984), the exclusionary rule should not be applied to evidence seized in the execution of a valid search warrant.

CONCLUSION

For the reasons discussed above, the State of Wisconsin, respondent, requests this Court to deny the Petition for a Writ of Certiorari.

Dated this 4th day of November, 1996.

JAMES E. DOYLE
Attorney General of Wisconsin

Stephen W. Kleinmaier

STEPHEN W. KLEINMAIER
Assistant Attorney General
Counsel of Record

Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8908

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

JAMES E. DOYLE
ATTORNEY GENERAL

Burneatta L. Bridge
Deputy Attorney General

123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

Stephen W. Kleinmaier
Assistant Attorney General
608/266-8908
TTY 608/267-8902
FAX 608/267-2223

November 4, 1996

Mr. William K. Suter
Clerk
United States Supreme Court
One First Street NE
Washington, D.C. 20543

Re: Steiney Richards v. State of Wisconsin
Case No. 96-5955

Dear Mr. Suter:

Enclosed for filing by first class mail please find ten copies of the Brief in Opposition to Petition for a Writ of Certiorari. As evidenced by the enclosed affidavit of service, a copy of the brief has been served by mail today on counsel for petitioner.

Sincerely,

Stephen W. Kleinmaier

Stephen W. Kleinmaier
Assistant Attorney General
of Wisconsin

Attorney for Respondent

SWK:slp

Enclosures

c: David R. Karpe
Attorney at Law
Post Office Box 260218
Madison, WI 53726-0218

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IN THE
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October Term, 1995

STEINEY RICHARDS,

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STATE OF WISCONSIN,

Respondent.

AFFIDAVIT OF SERVICE

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STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

SANDRA PIRK, being first duly sworn, on oath deposes and says that on the 4th day of November, 1996, she served the Brief in Opposition to Petition for a Writ of Certiorari by depositing a copy of the same in the United States mailbox, with first class postage prepaid to: David R. Karpe, Attorney at Law, Post Office Box 260218, Madison, WI 53726-0218

Sandra Pirk
Sandra Pirk

Subscribed and sworn to before me
this 4th day of November, 1996.

Adelia J. Carney
Notary Public, State of Wisconsin
My Commission: expires 10/17/99